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# the Supreme Court of the United States

OCTOBER TERM, 1903

No. 86

THE ROYAL INSURANCE COMPANY
*Plaintiff in Error*

*vs.*

RUPERTO MARTIN, AS EXECUTOR OF THE WILL OF FRANCISCO MARTIN, DECEASED

## BRIEF FOR PLAINTIFF IN ERROR

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EVENING POST JOB PRINTING HOUSE, NEW YORK.

# Supreme Court of the United States.

No. 86.

THE ROYAL INSURANCE COMPANY,
Plaintiff in Error,

v.

RUPERTO MARTIN, as Executor of the Will of Francisco Martin, deceased.

## BRIEF FOR THE PLAINTIFF IN ERROR.

### Statement.

This is a writ of error to the District Court of the United States for the District of Porto Rico. The action is assumpsit on a policy of insurance. The original plaintiffs were the widow, executor and heirs of Francisco Martin (Record, p. 1). Upon demurrer to the complaint on the ground of an improper joinder of parties (Rec., p. 10), the Court sustained the demurrer, holding that the executor was the only proper party (Record, pp. 11, 12). Thereupon the plaintiff amended, striking out all the parties plaintiff except Ruperto Martin, executor (Rec., p. 12). The declaration was that on or about January 1, 1898, the defendant made and renewed its policy of insurance and delivered the same to the late Francisco Martin and in consideration of a certain sum of money paid by

said Martin insured him against loss or damage by fire to the amount of £1,600 sterling on a building built of wood and covered with metal, situated at Coto Laurel, District of Ponce, Porto Rico, and also upon goods, chattels, merchandise and provisions in said building kept and contained (Rec., p. 2).

The policy contained, among others, the following clauses:

"3. This policy does not cover * * * loss or "damage by fire happening during the existence of "any invasion, foreign enemy, rebellion, insurrec- "tion, riot, civil commotion, military or usurped "power, or martial law within the country or local- "ity in which the property insured is situated, un- "less proof be made to the satisfaction of the di- "rectors that such loss or damage was not occa- "sioned by or connected with, but occurred from a "cause or causes independent of the existence of "such invasion, foreign enemy, rebellion, insurrec- "tion, riot, civil commotion, military or usurped "power or martial law" (Record, p. 33).

* * * * * *

"5. This policy ceases to be in force as to any "property hereby insured which shall pass from the "insured to any other person otherwise than by "due operation of law, unless notice thereof be "given to the company, and the subsistence of the "insurance in favor of such other person be de- "clared by a memorandum endorsed hereon by or "on behalf of the company (Record, p. 34).

The declaration alleged that the fire occurred on or about August 20, 1898, and that said property was consumed and destroyed by fire, whereby the said Francisco Martin, and thereafter his legal representatives sustained loss and damage to the amount of the sum insured, "which said loss and damage did not "happen by means of an invasion, insurrection, "riot or civil commotion, or of any military or "usurped power" (Record, p. 6); that the defendant

has not even considered the claim of the plaintiff but has refused to pay anything whatsoever on account of said loss (Record, p. 7); that Francisco Martin died October 25, 1900, and the plaintiff is the executor of his last will and testament (Record, p. 7).

The defendant pleaded among other things the following:

FIRST.—The general issue: "That it never promised in manner and form as in said declaration alleged * * *

"FOURTH.—* * * That plaintiff ought not to have his said action because the alleged loss or damage was caused by fire happening during the existence of an invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military and usurped power and martial law, within Porto Rico and in the locality in which the property alleged to have been insured was situated and that no proof was made to the satisfaction of the directors that such loss or damage as alleged was not occasioned by or connected with, but occurred from a cause or causes independent of the existence of such invasion, foreign enemy, rebellion, insurrection, riot, civil commotion, military or usurped power or martial law (Record, p. 13).

"SEVENTH.—That plaintiff ought not to have or recover herein for the reason that plaintiff has no interest in or right to recover because of the transfer and mortgage of said premises, and the foreclosure thereof" (Record, p. 14).

Issue was joined by replication on the first, fourth and seventh pleas (Record, p. 15).

The case was tried with a jury, who returned a verdict for $7,623 (Record, p. 17), for which sum judgment was entered on May 20, 1902, with interest thereafter at 12 per cent. per annum and costs (Record, p. 17).

A motion for a new trial and also a motion in

arrest of judgment were made, both of which were overruled (Record, pp. 17 to 20).

There is no question made of the jurisdiction of the Court below. The action was brought by a plaintiff who is alleged in the declaration to be a citizen of Porto Rico and resident of Ponce against the Royal Insurance Company, a corporation organized under the laws of England and having an office and doing business in the Island of Porto Rico (Record, p. 1).

By the act establishing the government of Porto Rico (31 Stat., Chap. 191, Sec. 34) passed April 12, 1900, it was provided that "Porto Rico shall con- "stitute a judicial district, to be called the District "of Porto Rico. The President by and with the ad- "vice of the Senate shall appoint a district Judge for "the term of four years unless sooner removed by "the President. The District Court for said district "shall be called the District Court of the United States "for Porto Rico * * * and shall have, in addi- "tion to the ordinary jurisdiction of district courts "of the United States, jurisdiction of all cases cog- "nizant in the Circuit Court of the United States, "and shall proceed therein in the same manner as a "Circuit Court."

By Chapter 812, Sec. 3, passed March 2, 1901, amending the foregoing act, it was provided, that "the jurisdiction of the District Court of the United "States for Porto Rico in civil cases shall, in addi- "tion to that conferred by the act of April 12, 1900, "extend to and embrace controversies where the "parties or either of them are citizens of the United "States or citizens or subjects of a foreign state or "states wherein the matter in dispute exceeds ex- "clusive of interest or costs the sum or value of "$1,000."

This action was commenced after the passage of this Act of 1901, and one of the parties was a foreign corporation. The other was a citizen of Porto Rico.

By Section 34 of the Act establishing the government of Porto Rico, the District Court of the United

States for Porto Rico, is required to proceed in cases within its jurisdiction in the same manner as a Circuit Court of the United States. This adopts for that Court the general common law rules of pleading in common law cases, such being the manner in which the Circuit Court proceeds in the absence of any State practice to which its practice could be assimilated by R. S., § 914. That section could have no application in Porto Rico.

## Assignments of error.

The following among others were alleged as errors in the Court below (Record, pp. 22, 24, 25):

"NINTH.—That said District Court of the United "States for Porto Rico erred in refusing to direct "the jury, upon request of plaintiff in error, after "they had returned a verdict in a lump sum, and "before the jurors had been polled, to retire and "return a separate verdict, showing the amount "found by them separately upon the building and "upon the stock of goods, merchandise and provisions, as provided by the policy for insurance "sued on."

"FOURTEENTH.—The said District Court of the "United States for Porto Rico erred in charging "the jury over the exceptions of plaintiff in error "as follows:

> "'The defense mainly relied upon here is "that this loss occurred during an invasion, "riot, civil commotion, military or usurped "power, or martial law. A fair construction "of that condition of the policy, in the "opinion of the Court, is that that must, in "order to excuse this company from liability "in case of loss of property by fire, that invasion by a foreign enemy, rebellion, insurrection, riot, civil commotion, military or "usurped power or martial law, must have "been occurring in the section of the country "where this loss occurred, or within the

"locality, and within such a radius of coun-
"try where that loss occurred, that danger
"arose to property by reason of the existence
"of that rebellion, invasion, insurrection,
"civil commotion, and military or usurped
"power or martial law. And I further tell
"you, gentlemen, that if you believe from the
"evidence that this destruction of this prop-
"erty did not occur from any of these causes,
"and occurred from a cause independent of
"the existence of any foreign enemy, rebel-
"lion, insurrection, riot, civil commotion,
"military or usurped power or martial law,
"that then you should find for the plaintiff
"in damages whatever you think may have
"been his loss, provided you believe the in-
"surance existed on the property. This is a
"reasonable construction of the law, as the
"Court thinks, of this and these conditions
"of the policy.'"

"Plaintiff in error assigns this charge of the Court "as error, because it varied the terms and contract "contained in the policy of insurance sued upon and "offered in evidence, and which had been accepted "by the insured, and that the effect of such ruling "was to narrow the application of the language of "such policy and to limit the defense of plaintiff in "error thereunder to proof that the loss was a di-"rect result of one of those enumerated conditions "or causes."

"FIFTEENTH.—The said District Court of the "United States for Porto Rico erred in refusing "the request of plaintiff in error for a charge as "follows:

"'If you believe that the loss occurred
"during the existence of invasion, foreign
"enemy, rebellion, insurrection, riot, civil
"commotion, military or usurped power or
"martial law, then you will find for the de-
"fendant.'

"to which ruling plaintiff in error then and there "excepted.

"SIXTEENTH.—The said District Court of the "United States for Porto Rico erred in its ruling "upon the said request of plaintiff in error, in the "following language:

> "'I understand you are claiming, for in- "stance, if the Germans invaded San Juan "and got into San Juan, and if this property "and this place had been destroyed by a boy "dropping a match, that the company would "be released. The Court has not that in "view.'

"SEVENTEENTH.—The said District Court of the "United States for Porto Rico erred in refusing to "charge the jury as requested by plaintiff in error:

> "'That if the jury believes from the evidence "that if at the time of the fire, or prior "thereto, the title to the stock of goods which "had been insured had passed out of Fran- "cisco Martin and into another person, or "other persons, the plaintiff herein could not "recover,'

"to which action of the Court the plaintiff in error "then and there excepted.

"Plaintiff in error assigns this ruling as error, be- "cause of the testimony of plaintiff, Ruperto Mar- "tin, that the stock of goods *re*covered by the in- "surance, was owned and controlled at the time of "the fire by the society or firm of Martin Brothers, "of which the insured, Francisco Martin, was, at "the time of said loss, only a sleeping or silent part- "ner."

The argument in support of these several errors with references to the testimony and the rulings of the Court and proceedings on the trial appears in the following points.

# POINTS.

## FIRST POINT.

### This Court has jurisdiction of this case.

The act establishing the Government of Porto Rico (Act of April 12, 1900, Ch. 191, 31 Stat., 85), contains the following:

"Sec. 35. That writs of error and appeals from "the final decisions of the Supreme Court of Porto "Rico and the District Court of the United States "shall be allowed and may be taken to the Supreme "Court of the United States in the same manner "and under the same regulations and in the same "cases as from the Supreme Courts of the Territo- "ries of the United States; and such writs of error "and appeals shall be allowed in all cases where "the Constitution of the United States, or a treaty "thereof, or an act of Congress is brought in ques- "tion, and the right claimed thereunder is denied."

The law determining the cases in which writs of error to and appeals from the Supreme Courts of the Territories of the United States may be taken, appears in the following statutes:

Revised Statutes, Sec. 702.

Act of March 3, 1885, Ch. 355, 23 Stat., 443.

Act of March 3, 1891, Ch. 517, § 15, 26 Stat., 826, 828 (known as the Circuit Court of Appeals Act).

By Section 702 of the Revised Statutes "the final "judgments and decrees of the supreme court of "any Territory, except the Territory of Washing- "ton, in cases where the value of the matter in "dispute, exclusive of costs, &c., exceeds $1,000,

" may be reviewed and reversed or affirmed in the " Supreme Court, upon writ of error or appeal, in " the same manner and under the same regulations " as the final judgments and decrees of a circuit " court. In the Territory of Washington the value " of the matter in dispute must exceed $2,000, ex- " clusive of costs. And any final judgment or " decree of the supreme court of said Territory in " any cause [when] the Constitution or a statute or " treaty of the United States is brought in question " may be reviewed in like manner."

The Act of March 3, 1885, Ch. 355 (§ 1), raised the jurisdictional amount to $5,000 in the case of all territories, but provided (§ 2) that " the preceding section shall not apply to any " case wherein is involved the validity of any patent " or copyright, or in which is drawn in question the " validity of a treaty or statute of or an authority " exercised under the United States; but in all such " cases an appeal or writ of error may be brought " without regard to the sum or value in dispute."

The Act of 1891, establishing the Circuit Court of Appeals, contained the following provision.

" Sec. 15. That the Circuit Court of Appeal in " cases in which the judgments of the Circuit Courts " of Appeal are made final by this act shall have the " same appellate jurisdiction, by writ of error or " appeal, to review the judgments, orders and de- " crees of the Supreme Courts of the several " Territories as by this act they may have " to review the judgments, orders and decrees " of the District Court and Circuit Courts; and for " that purpose the several Territories shall, by orders " of the Supreme Court, to be made from time to " time, be assigned to particular circuits.

By Section 5 of the same act, writs of error and appeals are allowed to this Court directly from the District and Circuit Courts in certain enumerated cases.

By Section 6 of the same act, the judgment or decrees of the Circuit Courts of Appeals are made final "in all cases in which the jurisdiction is depend- "ent entirely upon the opposite parties to the suit or "controversy being aliens and citizens of the United "States or citizens of different States; also in all "cases arising under the patent laws, under the "revenue laws, and under the criminal laws and "in admiralty cases."

It has been held in *Shute* v. *Keyser*, 149 U. S., 649; *Aztec Mining Co.* v. *Ripley*, 151 U. S., 79; *Folsom* vs. *The United States*, 160 U. S., 121; and *Simms* v. *Simms*, 175 U. S., 162, 166, where the effect of these statutes is considered, that the appellate jurisdiction of this Court from Supreme Courts of the Territories remains unimpaired, except as such appellate jurisdiction is transferred to the Circuit Courts of Appeals by the Act of 1891.

In *Shute* v. *Keyser*, *supra*, the Court says (p. 651):

> "There was no provision [in the Circuit "Court of Appeals Act] for appeals or writs "of error in cases not made final by Section "Six from the Supreme Courts of the Ter- "ritories to the Circuit Courts of Appeals, "and there was no express repeal of the pro- "visions of the prior acts regulating appeals "or writs of error in such other cases from "those courts to this. There is nothing to "indicate an intention that the judgments "and decrees of the Supreme Courts of the "Territories should not be susceptible of re- "view in the class of cases in which there "was no appeal or writ of error to the Cir- "cuit Courts of Appeals.
>
> "The result is that, as the acts regulating "appeals or writs of error from or to the "Supreme Courts of the Territories to or "from this Court were not repealed, except "to the extent specified, an appeal or writ of "error lies to this Court from the judgments "or decrees of those courts, except in cases "where the judgments of the Circuit Courts "of Appeals are made final."

See also *Union Central Life Ins. Co. v. Champlin*, 116 Fed. Rep., 858.

This case does not fall within either of the five enumerated cases by which, under the Act of 1891, the judgments or decrees of the Circuit Courts of Appeals are made final.

It obviously is not a case arising under the patent laws, the revenue laws, the criminal laws, nor is it an admiralty case.

Nor is it a case where the jurisdiction of the Court below is dependent entirely upon the opposite parties to the suit or controversy being aliens and citizens of the United States, or citizens of different States.

It may be suggested that the fact that this is a suit between an alien and a citizen of Porto Rico brings the case within the first of these specified classes of cases under Section 6 of the Act of 1891. It is clear, however, that the plaintiff in this suit is not alleged to be nor is he in fact a citizen of the United States.

Section 7 of the act establishing the Government of Porto Rico (31 Stat., 79), provides "that all in-"habitants continuing to reside therein who were "Spanish subjects on the 11th day of April, 1899, "and then resided in Porto Rico, and their children "born subsequent thereto, shall be deemed and held "to be citizens of Porto Rico and as such entitled "to the protection of the United States, except "such as shall have elected to preserve their alle-"giance to the crown of Spain on or before the 11th "day of April, 1900, in accordance with the provi-"sions of the treaty of peace between the United "States and Spain entered into on the 11th day of "April, 1899; and they together with such citizens "of the United States as may reside in Porto Rico, "shall constitute a body politic under the name of "the people of Porto Rico, with governmental "powers as hereinafter conferred and with power "to sue and be sued as such." The act clearly distinguishes between citizens of Porto Rico and citizens of the United States.

What is alleged in the pleadings with regard to

the plaintiff is that he is a citizen of Porto Rico (amendment to Declaration, Record, p. 12).

The cases in which the jurisdiction of the Circuit Courts is dependent entirely upon the opposite parties being aliens and citizens of the United States or citizens of different States are those in which the jurisdiction is given to the Circuit Courts of the United States by existing statutes. By the Act of August 13, 1888, Ch. 866, § 1, 25 Stat., 434, it is provided "that the Circuit "Courts of the United States shall have original "cognizance, concurrent with the courts of the "several States, of all suits of a civil nature, at "common law or in equity * * * in which "there shall be a controversy between citizens of "different States, in which the matter in dispute "exceeds, exclusive of interest and costs, the sum "or value aforesaid [*i. e.*, of $2,000] * * * or a "controversy between citizens of a State and "foreign States, citizens or subjects, in which the "matter in dispute, exceeds, exclusive of interest "and costs, the sum or value aforesaid."

The suits of which the Circuit Court has jurisdiction in which an alien is a party are necessarily limited by the Constitution to "controversies "between a State or the citizens thereof and "foreign States, citizens or subjects" (Constitution, Art. 3, Sec. 2). This does not include under the term "citizens thereof" a citizen of Porto Rico; it necessarily means a citizen of one of the United States. And this limitation of suits in which an alien is a party to suits between aliens and citizens of the United States is recognized in the 6th Section of the Circuit Court of Appeals Act, which has received a construction excluding its application to suits between foreign States and a citizen of the United States.

*Colombia v. Cauca Co.*, 190 U. S., 524, 526.

The language of the sixth section with regard to the class of controversies based upon diversity of citizenship is too plain and unambiguous to be extended by implication or upon a supposed analogy to a case between an alien and a citizen of Porto Rico, the language being "dependent entirely upon the opposite parties to the suit in controversy being aliens and citizens of the United States, or citizens of different States."

The clause in the 35th section of the act establishing the government of Porto Rico, "and such writs "of error and appeal shall be allowed in all "cases where the Constitution of the United "States, or a treaty thereof, or an act of "Congress is brought in question and the right "claimed thereunder is denied," does not restrict the scope of the language of the first clause "in the "same cases as from the Supreme Courts of the "Territories of the United States" to cases coming within the second clause. It is introduced into this section undoubtedly for the purpose of defining in what cases appeals are to be allowed in causes involving Federal questions, and in one respect it is more restricted than the rule adopted by the Statute of 1885 (23 St., 443), in regard to appeals from the Supreme Courts of Territories in causes raising Federal questions, inasmuch as in cases brought from Porto Rico, there is the additional requirement that the right claimed under the Constitution, treaty or law of the United States must be denied by the judgment or decree, whereas in the appeal from Territorial Courts it is enough that the question under the Constitution be involved in the case. This distinction is pointed out in *Snow* v. *U. S.*, 118 U. S., 346–352.

This difference in the rule in respect to cases involving Federal questions would sufficiently account for the introduction of this second clause without supposing an intention of Congress to restrict the scope of the first clause to cases falling within the

terms of the second clause, which would in effect render the first clause inoperative and unnecessary.

But for another reason the second clause should be construed as giving this Court appellate jurisdiction in addition to that given by the first clause, because there are clearly cases coming within the second clause which are not within the first clause.

By the 5th section of the Judiciary Act of 1891 appeals or writs of error may be taken from the district courts or from the existing Circuit Courts direct to the Supreme Court, in any case that involves the construction or application of the Constitution of the United States; in any case in which the constitutionality of any law of the United States or the validity or construction of any treaty made under its authority is drawn in question; in any case in which the constitution or law of a State is claimed to be in contravention of the Constitution of the United States. This does not include a case where a right is claimed under a statute of the United States and that claim is denied.

In writs of error to and appeals from the District and Circuit Courts, the judgments and decrees of the Circuit Court are by the 6th section made final in all cases other than those provided for in the 5th section unless otherwise provided by law. Therefore in either of the five classes of cases in which the judgment of the Circuit Court of Appeals is made final by the 6th section of the act of 1891, arising in the District Court of the United States for Porto Rico, as for instance, in a revenue or patent suit the judgment of the Circuit Court of Appeals on error to or appeal from the District Court of the United States for the district of Porto Rico would be final under the first clause of Section 35, even although a right claimed under a statute of the United States were denied and it would not be appealable to this Court but for this second clause of Section 35 which in such case gives

an appeal to this Court. There being then cases in which appellate jurisdiction is given to this Court by the second clause which the Court would not obtain under the first clause the fair construction of this additional clause is that it was intended to enlarge and not to restrict the jurisdiction given under the first clause.

There is nothing in the 34th section of the act establishing the government of Porto Rico which is inconsistent with the construction of the 35th section hereinbefore contended for.

The 34th section provides as follows: "The laws "of the United States, relating to appeals, writs of "error and *certiorari*, removal of causes, and other "matters and proceedings as between the courts of "the United States and the courts of the several "States shall govern in such matters and proceed-"ings as between the District Court of the United "States and the courts of Porto Rico."

There is some obvious confusion in the language of this clause, inasmuch as there is no such thing as an appeal or a writ of error, and perhaps no such thing as a writ of *certiorari*, between the District Court of the United States and the courts of Porto Rico, and the only one of the things mentioned which seems applicable as between these two courts is the removal of causes, which is applicable, since the District Court of Porto Rico has the powers and jurisdiction of a circuit court of the United States. This leads to the suspicion that some words should be supplied to make the provision sensible and applicable to the subject matter.

In the act to provide a government for the territory of Hawaii, passed during the same month-April 30, 1900, 31 St., Ch. 339, a somewhat similar provision occurs. Section 86, page 158, established a district court, which, like the District Court of the United States for the District of Porto Rico, is given the powers of a circuit court as

well as of a district court of the United States, and provides for an appeal therefrom to the Circuit Court of Appeals of the Ninth Circuit and contains the following provision: "The "laws of the United States relating to appeals, "writs of error, removal of causes and other mat- "ters and proceedings as between the courts of the "United States and the courts of the several States "shall govern in such matters and proceedings as "between the courts of the United States and the "courts of the Territory of Hawaii."

In *Ex parte Wilder's Steamship Co.* (183 U. S., 545), the question arose whether an appeal could be taken to the Circuit Court of Appeals for the Ninth Circuit from a final decree of the Supreme Court of the Territory of Hawaii, in an admiralty case pending in that Court at the time of the annexation of Hawaii to the United States. This Court in considering that statute determined that no such right of appeal was thereby given. The petitioner seems to have relied on Section 86, and in reference to the clause above quoted the Court say, "And the re- "maining clause as to appeals, writs of error, re- "movals of causes and other matters and proceed- "ings between the courts of the United States "and the courts of the Territory of Hawaii "provides that they shall be governed not "by the laws applicable to other territories, but "by the laws of the United States as to such mat- "ters and proceedings as between the courts of the "United States and the courts of the several States. "Congress may have considered that owing to the "great distance of the Territory of Hawaii from "the Continent, the appellate jurisdiction over that "Territory should be more restricted than over "other territories, and should extend only as in the "case of the several States to judgments against a "right claimed under the Constitution, laws or "treaties of the United States."

It seems to be assumed in this observation of the Court that the clause above quoted as to writs of error, appeals, &c., was intended to provide not only a rule in respect to procedure, but also in respect to the cases in which appeals could be taken, although perhaps this ruling was not essential to the point determined in the case before the Court. But assuming that this Court did so decide, the same construction could not be applied to the somewhat similar provision in the 34th Section of the Act for the Government of Porto Rico.

Admitting that the laws of the United States relating to appeals may include as well laws defining the cases in which appeals may be taken as laws regulating the procedure on appeals, yet in the Porto Rico Act we find another section (35) which expressly and in terms deals with the matter of the cases in which appeals may be taken. This being so, that section will be held to define those cases, and the appeals thus given will be neither enlarged nor restricted by doubtful language in another section which may be limited to matters of procedure. In other words, a right of appeal expressly given in Section 35 will not be deemed taken away by doubtful words in Section 34, the language of which may have been intended to govern procedure only.

In the Hawaiian Act there was no section corresponding to Section 35 in the Porto Rico Act, nor any provision in any part of the act which could be construed as giving any appeal from the Supreme Court of the Territory other than this particular clause in Section 86.

Therefore, the case of *ex parte Wilder's Steamship Company* has no force as an authority against the construction here contended for of Section 35 of the Porto Rico Act, even if it is assumed for the purpose of giving some intelligent meaning to the language that the words "as between the District Court of the United States and the courts of Porto Rico" in Section 34 mean "as between the courts of the United States and the courts of Porto Rico."

In the foregoing argument it is assumed, for the sake of the argument, that the test in respect to a territorial case of the finality of the judgment of the Circuit Court of Appeals, and hence the test of the appealability of the case to the Circuit Court of Appeals is whether it would be appealable under Section Six if the same case had arisen in a Circuit Court of the United States and the parties were an alien and a citizen of the United States or citizens of different States, and this seems to have been assumed by the courts in some of the cases cited above.

Thus in the case of the *Aztec Mining Company* v. *Ripley* (53 Fed. Rep., 7), the plaintiff in the court below (Ripley), a resident of New Mexico, sued the Aztec Mining Company, a corporation organized under the laws of New Mexico, in an action at law. The question was whether the judgment below in favor of Ripley was appealable to the Circuit Court of Appeals, under Section 15. Judge Shiras, in giving the opinion of the Court says:

> " By order of the Supreme Court, the terri-
> " tory of New Mexico has been assigned to
> " this Circuit, and this Court, therefore, pos-
> " sesses over the decrees and judgments of
> " the Supreme Court of that territory the
> " jurisdiction that is conferred by the section
> " of the Act of March 3, 1891, above cited.
> " This section expressly limits the appellate
> " jurisdiction of this Court to cases in which
> " the judgment of this Court is made final by
> " the provisions of the Act of March 3,
> " 1891. Section 6 of that act enacts
> " that 'the judgments or decrees of
> " ' the Circuit Courts of Appeal shall
> " 'be final in all cases in which the jurisdic-
> " ' tion is dependent entirely upon the oppo-
> " ' site parties to the suit or controversy being
> " ' aliens or citizens of the United States or
> " ' citizens of different States; also in all cases
> " ' arising under the patent laws, under the
> " ' revenue laws and under the criminal laws
> " ' and in admiralty cases.'

> "The case at bar does not come within "any one of the classes wherein the judg- "ment of this Court is declared to be a "finality. It is not a case in admiralty, nor does "it arise under the criminal, revenue or patent "laws of the United States, nor is it a case "between aliens and citizens of the United "States or between citizens of different States; "and, therefore, it does not belong to any of "the classes of cases in which this Court is "clothed with appellate jurisdiction."

The learned Judge here states correctly in the terms of the 6th section, the test of finality and appealability, namely, that the jurisdiction is dependent entirely upon the opposite parties in the suit or controversy being aliens and citizens of the United States or citizens of different States, but when he comes to show that the case is not within the test he says: "Nor is it a case between aliens and citizens of the "United States or between citizens of different "States." This does not show that the test was not properly applied or was not intended to be properly applied by the learned Judge, because if the case was not a case between aliens and citizens of the United States or between citizens of different States then the jurisdiction of the Court below could not be dependent entirely upon that diversity of character in the parties. It was enough perhaps in order to show that the case was one in which the jurisdiction below did not depend upon the diverse character of the parties to point out that the parties were not of this diverse character, and it cannot be argued from this mode of dealing with the subject that the learned Judge thought the real test under the 15th Section was the diverse character of the parties, rather than the fact that the jurisdiction of the Court below depended thereon. So when the case came to this Court (*Aztec Mining Co.* v. *Ripley*, 151 U. S., 79), the learned Chief Justice, in delivering the opinion of the Court, says:

> "By the fifteenth section of the Judiciary
> " Act of March 3, 1891, the Circuit Courts of
> " Appeals, in cases in which their judgments
> " were made final by the act, were empow-
> " ered to exercise appellate jurisdiction over
> " the judgments, orders or decrees of the
> " Supreme Courts of the several territories;
> " but as this case was not a case in admiralty,
> " nor a case arising under the criminal, rev-
> " enue or patent laws of the United States,
> " nor a case between aliens and citizens of
> " the United States or between citizens of
> " different States, it did not belong to
> " either of the classes defined by Section 6 of
> " that act, as cases in which the judgments
> " or decrees of the Circuit Courts of Appeals
> " should be final, and therefore the Circuit
> " Court of Appeals for the Eighth Circuit
> " properly declined to take jurisdiction."

This statement would be equally true if the true test is that the jurisdiction of the Court below was dependent wholly on this diversity in the character of the parties. If the parties are not of that character then the jurisdiction below cannot depend on it. The assumption, therefore, or possible assumption, that in territorial cases the test is the diverse character of the parties and not the question whether by reason of that diversity of character the Court below had jurisdiction, does not clearly appear in these *dicta*, although they are susceptible of that view. They are also quite consistent with the theory that the courts apparently making these assumptions had clearly in mind at the same time that the test was whether the jurisdiction of the Court below was thus entirely dependent on the character of the parties.

So in *Folsom* v. *United States* (160 U. S., 121, 126), the learned Chief Justice says:

> "The fifteenth section confers appellate
> " jurisdiction on the Circuit Courts of Appeals
> " to review the judgments of the Supreme
> " Courts of the Territories, but it is in terms

> " the same appellate jurisdiction as conferred
> " by the sixth section in respect of the judg-
> " ments of District and Circuit Courts, and
> " this being so, is limited to those cases in
> " which, if decided by the District and Cir-
> " cuit Courts, the judgments of the Circuit
> " Courts of Appeals would be final."

The case before the Court was a criminal case, where the defendant had been convicted of an infamous crime, a case clearly within section five, directly appealable to this Court. The question was whether it was appealable to the Circuit Court of Appeals under the sixth section. It was held not so appealable.

This particular question as to the meaning of the first test of section six, as applied to section fifteen, relating to territorial cases, was not before the Court for decision. And what is said, as quoted above, is true in either view that may be taken of this question, because the appellate jurisdiction is the same as it would be in the same cases brought from the Circuit Court under section six, namely, that the jurisdiction of the Court below was dependent not on alienage and citizenship or diverse citizenship *per se*, but on that being the sole ground of jurisdiction in the Court below.

That the appellate jurisdiction is limited " to " those cases in which, if decided by the District " and Circuit Courts, the judgments of the Circuit " Courts of Appeals would be final," is undoubtedly true if in fact it is still more strictly limited to such of those cases in which the jurisdiction of the Court below was thus entirely dependent on the character of the parties.

And in *Union Central Life Ins. Co.* v. *Champlain* (116 Fed. Rep., 858) Judge Sanborn says, page 859:

> " It will be noticed from this quotation that
> " jurisdiction is given to this Court only in
> " cases in which its judgments are made final
> " by the act of March 3, 1891. Those cases

> " are specified in section 6 of that act, which
> " reads: 'And the judgments or decrees of
> " the Circuit Courts of Appeals shall be final
> " in all cases in which the jurisdiction is de-
> " pendent entirely upon the opposite parties
> " to the suit or controversy, being aliens and
> " citizens of the United States or citizens of
> " *different* States; also in all cases arising
> " under the patent laws, under the revenue
> " laws, and under the criminal laws, and in
> " admiralty cases. The jurisdiction in this
> " case is not dependent upon the opposite
> " parties to the suit or controversy. It does
> " not appear from the record that these par-
> " ties are aliens on the one side and citizens
> " of the United States on the other, or that
> " they are citizens of different States. This
> " is not a case arising under the patent laws,
> " the revenue laws, or the criminal laws, nor
> " is it an admiralty case. Hence it does not
> " fall within the jurisdiction of this Court."

This is subject to the same criticism as the case of *Aztec Min. Co.* v. *Ripley*. The reason given that the diverse citizenship did not exist was in fact decisive of the question whether the jurisdiction depended on it.

But it seems quite clear that the first specification of Section six of the Circuit Court of Appeals Act has no practical application to territorial cases. The jurisdiction of the territorial courts never depends entirely on such diversity of nationality or citizenship. They are courts having a general jurisdiction in law and equity. Any person may sue any other person found within the territorial jurisdiction without regard to alienage or citizenship. And since the Amendatory Act of 1901 this is true of the jurisdiction of the District Court of the United States for Porto Rico. If *either* party is an alien or a citizen of the United States that Court has jurisdiction; and although the Court is called the District Court of the United States it is merely a statutory Court not exercising any part of the judicial power of the

United States, and it was competent for Congress to make this provision. As all men who are not citizens of the United States are aliens, including citizens of Porto Rico under the latter designation the jurisdiction of the Court as regards persons seems to be co-extensive with that of the territorial courts.

Section 15 of the Circuit Court of Appeals Act obviously applies the same tests of finality of judgment and hence of appealability as Section 6 to each case as it arises. One of these tests is, is it a case where the jurisdiction of the Court below was dependent on the opposite parties being of a certain character. Inasmuch as with a territorial court jurisdiction is never so entirely dependent this test becomes practically inapplicable. The other tests remain and are practically operative, since a patent case, a revenue or criminal, or an admiralty case may come into these courts. If this first test were the only test of appealability, then indeed, it might be necessary to construe it as meaning if the jurisdiction in a case between the same parties in a circuit or district court were thus dependent, as otherwise there could never be a case made final or appealable by the application of this test, but this not being the only test it simply becomes practically inoperative or inapplicable in cases under the fifteenth section. The test remains, but no case can ever arise under it. Thus, suppose territorial courts had no jurisdiction in patent cases, the specification of patent cases would as regards territorial cases become in the same way practically inoperative or inapplicable, or, it may be said the test would remain but there would be no cases coming within it.

The proper construction of Section 15 would seem to be this, that as regards territorial cases the test of finality and of appealability to the Circuit Court of Appeals is precisely the same as in cases arising in circuit and district courts. Now, the test in

these cases is not the political character of the parties to the action, but whether the jurisdiction of the Court below depends entirely on that political character. In the Circuit and District Courts it would so depend, unless there were some other ground of jurisdiction. In territorial cases it would not. Hence the one would be appealable, the other not.

The cases between aliens and citizens of the United States or between citizens of different States in territorial courts must be insignificant in number compared with the whole number of cases litigated in those courts, and there seems to be no reason of public policy requiring this particular class or small number of their judgments to go to the Circuit Courts of Appeal, while all other cases not revenue, criminal, patent or admiralty cases involving $5,000 at least come to this Court. Giving this natural interpretation to the 15th Section will not appreciably burden this Court.

This question can only arise directly in a case coming from a territorial court or from the District Court of the United States for Porto Rico between an alien and a citizen or between citizens of different States. No such case seems to have arisen.

If this suggested construction is correct then this Court has jurisdiction because the case is neither a patent, a revenue or criminal or an admiralty case nor one in which the jurisdiction of the Court below is entirely dependent on the parties being an alien and a citizen or citizens of different States.

For the decision of the present case, however, it seems to be conclusive that the parties were an alien and a citizen of Porto Rico, and not an alien and a citizen of the United States.

## SECOND POINT.

**The Court erred in its rulings with reference to the defense that the policy had become void by the transfer of the personal property covered by the policy from Francisco Martin, the assured, to Martin Brothers, his sons, although he retained an interest, as it is stated in the Record, as a silent partner.**

Upon the undisputed evidence in the case the policy was avoided by this change of interest in the stock of goods, part of the property insured. By the fifth condition of the policy it was to become void if any of the properties insured in it passed to another person or any person not proceeding from testamentary disposition or from the operation of laws, if the company is not informed and the insurance in favor of the new owner is not declared by a note endorsed on the policy by the company or its representative.

The property insured was a building situated at Cobo Laurel and the goods, chattels and merchandise and provisions in said building kept and contained. It appears by the record and by the charge of the Judge that the goods insured were a shifting stock of merchandise. The fact of change of interest was shown by the testimony of the plaintiff himself. The plaintiff testified (Record, p. 31, fol. 51):

> " Q. In the year 1898 did your father have
> " that building—was he the owner of it?
> " A. Yes.
> " Q. What interest did your father have in
> " these goods and stock?
> " A. He was a silent partner."

The insurance was £700 on building, £900 on stock in trade in said building and groceries (Policy, Record, p. 32, fol. 52).

The plaintiff testified that the stock consisted of provisions, merchandise, shoes, hats, everything carried in a commercial house, coffee, tobacco, rice and other articles (Record, p. 36, fol. 57); that it was all destroyed by fire (Record p. 40, fol. 60); that the firm consisted of his brother and himself; that his father was a silent partner, having an interest of $10,000 in the firm; and that the insurance was continued in his father's name but for the benefit of the three (Record, pp. 43, 44, fol. 63).

On cross-examination the plaintiff testified that he was an active partner (Record, p. 44, fol. 64); that the firm was founded in 1897, and his father retired as active partner, and that the business was turned over to Martin Brothers, who managed the business (Record, p. 45, fol. 65); that the building was worth 4,000 pesos ($2,400), and the provisions and merchandise 15,000 pesos ($9,000) (Record, p. 47, fol. 67).

There was no other testimony in respect to the title of this stock of goods. By this testimony it also appeared that the goods constituted the principal part of the property insured, and the Court even refused to direct the jury to find separately the value of the building and of the goods burned, to which the defendant excepted (Record, p. 84, fol. 113).

A transfer to a firm including the insured is a transfer within the condition of the policy and avoids it. The rule and the principle on which it rests is thus stated by the New York Court of Appeals in the *Germania Fire Ins. Co.* v. *Home Ins. Co.*, 144 N. Y., 195, 199.

> "It would be a harsh and indefensible rule
> "that required the underwriter, who had in-
> "sured an individual on a stock of goods in a
> "store, to continue the insurance after the in-
> "sured had taken in two partners and formed

"a firm wherein each partner was vested
"with an undivided third interest in the
"property covered by the policy, without
"having been afforded the opportunity to
"examine into the moral and business char-
"acters of two strangers to the original con-
"tract."

The principle also is well stated by Mr. Justice Miller in delivering the opinion of the Circuit Court of Appeals in *Drennen* v. *London Assurance Corp.*, 20 Fed. Rep., 657–8, as follows:

"The sale or transmutation of the various
"interests between the partners themselves,
"and nobody else having the control, and
"leaving the possession where it was, does
"not invalidate the policy; but the introduc-
"tion of a new partner, with an investiture
"of an interest in him which he did not have
"before, does avoid the policy.

"There are two things with regard to
"which the insurers are always cautious,
"tenacious and anxious; one of them is the
"character of the men with whom they
"make the contract, and the other is the
"character of the man who has possession of
"the property, especially if it be movable
"property that is insured; and it is easy to
"see why this is so. They may very well
"know that the man or men with whom
"they deal when the contract is made are
"cautious, prudent business men, honest,
"and for a long time successful in business;
"with those men they contract without hes-
"itation. They have the right to know who
"those men are with whom they contract and
"the character of the men with whom they con-
"tract with regard to the possession of the
"property. They make a contract with A, be-
"cause they know him, or because they have
"heard of his character; because they under-
"stand that he is honest and fair; and they
"deal with him just as you would deal with
"one whom you know to be reliable; you
"will seek to deal with honest men only.
"Now, it is against all the principles of con-
"tracts to say that in dealing with one man

"or with two men, that those two can after-
"wards, acting without the consent of the
"other party, introduce another man into the
"contract, who has all the rights and all the
"control which those two had before, because
"that man may be a scoundrel, may be
"known to be a scoundrel by the insurance
"company; and if that rule prevails, the
"other parties have a right to introduce the
"veriest scum of the earth, and men who
"have half a dozen times been engaged in
"the destruction of property to get the in-
"surance. So you may sell the goods in-
"sured, but you cannot sell the policy unless
"the company agrees to it. We are of the
"opinion that if Mr. Arndt was, within the
"meaning of that policy, introduced into that
"partnership, and became a member of it
"before the loss, and acquired an interest in
"the goods, that the policy was forfeited."

And although that case came to this Court and was reversed, the reversal was wholly on the ground of error in finding that there was a partnership formed by written agreement and that by force of this written agreement there was a change of interest.

*Drennen* v. *London Ass. Corp.*, 113 U. S., 51.

*London, Ass. Corp.* v. *Drennen*, 116 U. S., 461.

This, then, being the undoubted fact on the plaintiff's own testimony, and the effect of the evidence being that the policy became void, the further question is whether there was error available to the plaintiff in error in the rulings of the Court with regard to this defense. In the course of the charge of the Judge to the jury, the Judge said:

"Another defense presented is, that the
"property passed by mortgage or transfer
"without the consent of the company. I
"have no recollection of any testimony on
"that point."

At the close of the charge the following occurred:

> "*Mr. Dexter* [Defendant's Counsel]: I failed "to hear any reference to the alienation of "the stock. The defendant would ask the "Court to charge that if the jury believes "from the evidence that if, at the time of "the fire or prior thereto, the title of the "stock of goods which had been insured had "passed out of Francisco Martin and into "another person or other persons, the plain- "tiff herein could not recover.
>
> "*The Court:* That I could not give be- "cause the testimony does not support it. "There is no testimony that there has been "an alienation to anybody else. If to a "partner, however, the partner has an in- "terest in the entire stock of the goods in- "sured.
>
> "*Mr. Dexter:* We simply ask for a modifi- "cation of the charge to state that if there "was an alienation——
>
> "*The Court:* I do not think there was any "testimony to support the statement that "there was any alienation.
>
> "*Mr. Dexter:* Defendant makes that re- "quest upon the testimony of the witness.
>
> "*The Court:* Do not state the testimony. "Save an exception.
>
> "Gentlemen of the jury retire and make "a verdict" (Record, pp. 83–4, fols. 111–2).

The Court apparently took the view that an alienation to a firm of which the insured was a partner was not an alienation within the terms of the policy. Upon the authorities above cited it is insisted that this was clearly error, and that this request for a charge was correct and the exception taken was good.

This error of the Court in refusing to charge that if they found that the title to the goods had passed out of Francisco Martin to other persons the plaintiff could not recover is covered by and sustains the seventeenth assignment of error.

After the verdict and before the jury was polled it was error also for the Court to refuse to instruct

the jury to separate the damages found by them for loss upon the building and the stock of goods, because as to the stock of goods certainly the point was well taken that the policy had become void (Record, p. 84, fol. 113), and the ninth assignment of error covers this point and was well taken.

This ruling of the Court deprived the defendant of the right to have the verdict limited to the building if the condition did not affect the insurance on the building also.

This defense of a change of interest was fairly raised by the special plea and also by the general issue.

The seventh plea (Record, p. 14, fol. 20), was sufficient to raise this question. The plea of the general issue also raised the question.

In *Edson* v. *Weston* (7 Cow., 280), SAVAGE, *Ch. J.*, says:

> "In assumpsit, most defences are admis-
> "sible under the general issue. The plea,
> "indeed, denies simply that there was such
> "a contract. But the practice under it has
> "been to receive evidence of matter in dis-
> "charge, or excuse of performance; as a
> "release, or parol discharge, payment, or
> "that it became impossible or illegal to per-
> "form the contract (1 Chit. Pl., 470–1, and
> "cases there cited). In general, anything
> "may be shown which proves that the plain-
> "tiff never had a cause of action."

So also Chitty says (Ch. Pl., 6th Am. Ed., p. 513):

> "Hence it may be collected that under the
> "general issue any matter which shows that
> "the plaintiff never had cause of action, may
> "be given in evidence; and also, that under
> "that plea most matters in discharge of the
> "action, which show that at the time of the
> "commencement of the suit the plaintiff had
> "no subsisting cause of action, may be taken
> "advantage of. As the object of pleading is
> "to appraise the adverse party of the ground
> "of defence in order that he may be prepared
> "to contest it, and may not be taken by sur-

> " prise, it is singular that under the general
> " issue, which in terms only denies a valid
> " contract, the defendant should be permitted
> " to avail himself of a ground of defence
> " which admits a valid contract, but insists
> " that it has been performed, or that there is
> " an excuse for the non-performance of it, or
> " that it has been discharged; it is, as observed
> " by Lord Holt, a practice which has crept in
> " improperly, but is now perhaps too settled
> " to be altered."

And in *Oscanyan* v. *Arms Co.* (103 U. S., 261), the Court says (pp. 266–7):

> " Whilst, however, at the common law,
> " under the general issue in assumpsit, it was
> " always admissible to give in evidence any
> " matter which showed that the plaintiff
> " never had a valid cause of action, in prac-
> " tice many other matters were allowed under
> " that plea, such as went to the discharge of
> " the original cause of action, and showed
> " that none subsisted at the commencement
> " of the suit—such as payment, release, ac-
> " cord and satisfaction, and a former recov-
> " ery, and excuses for non-performance of the
> " contract; and also that it had become im-
> " possible or illegal to perform it. 1 Chitty,
> " Pleadings, 493; *Craig* v. *The State of Mis-*
> " *souri*, 4 Pet., 410–426; *Edson* v. *Weston*, 7
> " Cow. (N. Y.), 278; *Young* v. *Rummell*, 2
> " Hill (N. Y.), 278."

The evidence in this case of the alienation of the property showed that under the policy the plaintiff had no cause of action at the time of the commencement of the suit. It also showed that the averment of the declaration that Francisco Martin, plaintiff's testator, sustained the loss and damage by the fire (Record, p. 6, fol. 10) was untrue, and this is certainly a fact to be availed of under the general issue.

Even if there had been any technical defect in the pleas, no such objection was taken on the trial by the Court or by the defendant in error. The

point taken by the Court was that there was no evidence of an alienation such as the condition in the policy called for.

## THIRD POINT.

**There was error also in the rulings of the Court with reference to the ground of defense that the policy was void, for the reason that the fire occurred during an invasion, riot, &c.**

The language of the policy is explicit, as follows:

"This policy does not cover * * * loss or "damage by fire happening during the existence of "any invasion, foreign enemy, rebellion, insurrec- "tion, riot, civil commotion, military or usurped "power, or martial law within the country or lo- "cality in which the property insured is situated, "unless proof be made to the satisfaction of the "directors that such loss or damage was not oc- "casioned by or connected with, but occurred from "a cause or causes independent of the existence of "such invasion, foreign enemy, rebellion, insurrec- "tion, riot, civil commotion, military or usurped "power or martial law" (Policy, Record, p. 33, fol. 53).

The Spanish law in force in the island at the time this policy was issued and also at the time the loss occurred, which was kept in force by Section 8 of the Porto Rican Act, expressly provided that "Un- "derwriters shall not secure against fire caused by "the crime of the insured, nor by military forces "in time of war, nor on account of those caused by "mobs, or by eruptions, volcanoes and earth- "quakes" (translation of Code of Commerce, published by U. S. War Department, 1899, Sec. 399).

The Spanish text of this provision is as follows:

"El asegurador no responderá de los incendios "ocasionados por el delito del asegurado, ni por "fuerza militar en caso de guerra, ni de los que se "causen en tumultos populares, así como de los "producidos por erupciones, volcanes y temblores "de tierra."

The fourth plea sets up this defense (Record, p. 13, fol. 20).

The testimony bearing upon this question was as follows:

The plaintiff who was called as a witness on his own behalf, on his direct-examination testified as follows (p. 44, fol. 64):

"Q. Please state whether or not you had been in "Coto shortly before the fire occurred?

"Ans. The day before.

"Q. State in what condition was Coto then so far "as tranquility was concerned?

"Ans. It was in normal condition.

"Q. Had you been before that time in Coto?

"Ans. Yes.

"Q. How long before?

"Ans. Two days.

"Q. In what condition was it then?

"Ans. Normal.

"Q. You mean to say two different days in the "week before the fire?

"Ans. Yes; different days in the same week.

CROSS-EXAMINATION:

By Mr. Dexter:

"Q. How old are you, Mr. Martin?

"Ans. Thirty years old.

"Q. At the time of this fire what were you en- "gaged in; what profession or occupation?

"Ans. I was here in Ponce with my family.

" Q. How long before that time had you been liv-
" ing in Coto?
" Ans. Three years.
" Q. How long before the fire was it that you and
" your family went down to Ponce?
" Ans. Fifteen days, more or less.
" Q. Did all the family go down with you to
" Ponce?
" Ans. The ladies of the family always lived in
" Ponce, but we men came to Ponce now and then.
" Q. What was your interest or connection in that
" business of your father prior to the fire?
" Ans. I was an active partner.
" Q. When was this society formed under the
" name of " Martin Hermanos "?
" Ans. In 1897; I believe it was in March.
" Q. Was that accomplished by means of some
" writing before a notary?
" Ans. Yes.
" Q. Did your father then retire from business as
" an active partner?
" Ans. Yes.
" Q. And the business that formerly belonged to
" him was turned over to Martin Hermanos?
" Ans. Yes.
" Q. Where did your father live after the organ-
" ization of that society?
" Ans. He lived here, and there.
" Q. Did he give any attention to the business
" after this organization?
" Ans. Yes.
" Q. Who managed the business?
" Ans. Martin Brothers.
" Q. You managed the business, did you?
" Ans. Yes.
" Q. Up to the time of the fire everything was
" peaceful and quiet in Coto, was it?
" Ans. Yes.
" Q. No excitement?
" Ans. None.
" Q. No mobs?

"Ans. None.

"Q. Nobody was threatened with death or the de-
"struction of stealing of their property?

"Ans. Nobody.

"Q. Nobody's property was taken out of their
"house by bandits or armed mobs?

"Ans. After the invasion?

"Q. Yes.

"Ans. Nobody.

"Q. After the invasion nothing of that kind
"occurred?

"The Court: I think that is going too far. The
"question is whether this property was destroyed
"by reason of a riot or invasion.

"Mr. Dexter: In the time of a riot. I am proving
"by this witness whether or not this was in any——

"The Court: You do not fix the time. It might
"be a year from the time of the fire. I do not think
"you can attack his credibility by immaterial mat-
"ter.

"Q. All these questions that I have asked you
"refer to a few days before this fire—upon the day
"of the fire or a day or two before it?

"Ans. Nobody was deprived of anything.

"Q. Nothing of the kind had happened at any
"time up to the time of the fire?

"Ans. Nothing.

"Q. You had no occasion to make any complaint
"about being attacked on or about the time of this
"fire?

"Ans. No, sir.

* * * * * *

"By Mr. Boerman (p. 47, fol. 67):

"Q. When you testified that there were no
"threatenings or attacks upon persons before the
"fire, you mean so far as your knowledge was con-
"cerned?

"Ans. There was nothing.

"Q. There may have been, so far as you do not
"know, some kind of these things?

" Ans. Before the fire there was absolutely noth-
" ing.
" Q. That is, while you were there?
" Ans. Yes.
" Q. The time you refer to is from after the inva-
" sion up to the time of the fire, is it?
" Ans. Yes."

The plaintiff having rested the defendant called as witness P. J. Rosaly, who testified that he was a sugar planter, connected with the banking house of De Ford & Co. and lived in Ponce; that from 1895 to 1899 he was connected with the firm of Felice y Cia., who did business as agents for the Royal Insurance Company (Record, p. 52, fol. 72). This witness testified as follows (p. 56, fol. 77):

" Q. Do you know the conditions that prevailed in
" the barrio of Coto Laurel on August 19, 1898?
" Ans. Yes.
" Q. With reference to insurrection, riot and in-
" vasion?
" Ans. Yes.
" Q. Please state what that was, of your own
" knowledge?
" Ans. Do you mean to say if I was present?
" Q. Do you know whether or not there was any
" invasion in progress at the time and place of your
" own knowledge?
" Ans. Yes.
" Q. What was that invasion?
" Ans. The American troops were there a little
" while before, and I went there personally the day
" after the fire.
" Q. What was the condition of affairs as you
" found them?

" The Court: That is not competent.

" Q. What time of the day did you arrive?
" Ans. In the morning about 8 o'clock.
" Q. What were the conditions that you found
" there at that time?

" Ans. The American troops were there with a " captain in charge—some prisoners and some na- " tives were running away from the place.

" Q. Do you know the occasion of the troops com- " ing there?

" Ans. Yes.

" Q. What was that? Please state what you saw " there that morning, and what was the cause of the " troops coming there?

" Ans. I saw the rest of the fire there of the house " that was burned, and some prisoners.

" Q. When did the troops land in Porto Rico?

" Ans. July 25th in Guanica and 28th in Ponce.

" Q. From the time that they landed in Ponce in " which direction did they proceed?

" Ans. Toward San Juan by the military road; " towards Utuado by the military road, and they " were at Guanica and Arroyo.

" Q. On August , 1898, or about that date what " conditions did the troops encounter about that " place, and in that vicinity?

" Ans. There had been some trouble about there at " Soto, and the troops had been ordered to go down " and occupy Coto Laurél.

" Q. Did you have occasion to go yourself to the " military commander about that time?

" Ans. Yes.

" Q. Whom did you see?

" Ans. I saw General Wilson.

" Q. Did you see this plaintiff there when you " went there to see General Wilson?

" Ans. Yes.

" Q. About when was that?

" Ans. Some days before the fire.

" Q. About how many days more or less?

" Ans. Say three.

" Q. Did you hear what he said?

" Ans. Do you mean Mr. Martin?

" Q. Yes.

" Mr. Boerman: I object to it as it is a conversa- " tion between two parties at that time that had no

" interest in this suit. This man was not executor
" then.

" Mr. Dexter: I want to contradict the other wit-
" ness.

" Q. What was said by him there at that time,
" two or three days before the fire?

" Ans. He said that the place was in a condition
" of riot and he was not secure and his properties
" *were in danger.*

" Q. Did he say anything about the provisions of
" the store being stolen and taken out of the place?

" Ans. His own place, you mean?

" The Court: Do not lead the witness. Gentlemen
" of the jury this testimony is only competent in so
" far as it may tend to contradict the plaintiff in the
" case.

" Q. Do you know if on August 19, 1898, there
" there was any insurrection or riot or civil commo-
" tion in Coto Laurél?

" Ans. Yes, the fire was attributed to that.

" The Court: Do not tell what you heard.

" Q. Please state the general condition existing
" there with reference to riot, civil commotion or
" insurrection at that time, August 19, or in those
" days immediately before the fire?

" Ans. All I know about the conditions is what I
" heard.

" Q. Where were you on August 19, 1898?

" Ans. Here in Ponce.

" Q. How far was Coto from Ponce?

" Ans. About one half an hour, or less than that.

" Q. About what time immediately prior thereto
" did you yourself see anything of a riot, civil com-
" motion or insurrection?

" The Court: Confine it to that time and place?

" Ans. I was not there immediately before the fire.

" Q. Do you know if in the vicinity of Ponce and
" Coto between the time the Americans landed in

" Porto Rico and up to the time of this fire, what the " general condition of the community around about " Coto and Ponce was with reference to insurrection " and riot?

" Mr. Boerman: I object to the question as the " place is not fixed.

" The Court: Put it at that place or the imme- " diate vicinity.

" Mr. Dexter: I think the fair construction of the " policy is not to limit it to the immediate place, but " the language of the policy is as to the existence of " a riot.

" The Court: It must be in that place; in that im- " mediate vicinity.

" Q. Do you know whether there was martial law " in Coto Laurél at that time?

" Ans. No, I do not know it.

" Q. Was there immediately upon the occasion of " the fire?

" Ans. Yes.

" The Court: I think what occurred afterwards " is not competent.

On CROSS-EXAMINATION the witness testified as follows (Record, p. 59, fol. 80):

" Q. How many days before the fire did you go to " Coto?

" Ans. Several months—one or two months.

" Q. And so, you have not been to Coto from " several months before the fire until the day after " the fire?

" Ans. Yes.

" Q. When you came to Coto what time was it?

" Ans. About eight o'clock in the morning.

" Q. Are you sure that it was not later that that?

" Ans. It was in the morning; I left here about " 7.30, and must have arrived there about then.

" (Witness retires).

" And thereupon the defendant to further main-
" tain the issues on its part, introduced as a witness
" HENRY C. FRITZE, who, being duly sworn, testified
" as follows:

" (HENRY FRITZE) for defense:

" By Mr. Dexter (p. 59, fol. 80):

" Q. Mr. Fritze, what is your full name?
" Ans. Henry C. Fritze.
" Q. Where do you live?
" Ans. Here in Ponce.
" Q. Mr. Fritze, do you know the plaintiff in this
" case?
" Ans. Yes.
" Q. Did you see him anywhere a few days before
" August 19, 1898?
" Ans. I saw Mr. Martin one night at General
" Wilson's office.
" Q. About when was that, if you remember?
" Ans. A few days after the American troops had
" disembarked.
" Q. Did you hear what he said?

" Mr. Boerman: I object to the question because
" this is hearsay and secondary evidence, unless
" they first called him and asked him and then
" wanted to contradict him with another witness.
" The Court: I think you should have asked the
" party whether he said so and so. You should
" have examined him on these points. You can
" attack him on these points by proving a different
" state of facts, but you must first ask him what
" he said in reference to it.
" Mr. Dexter: I will ask your Honor's permission
" then to recall Mr. Martin in order to examine him
" on this point.
" The Court; Well, call him.
" (Mr. Fritze makes way for Mr. Martin who
" takes the stand.)

" RUPERTO MARTIN, recalled.

" CROSS-EXAMINATION (con.):

" By Mr. Dexter (p. 66, fol. 81):

" Q. Did you not have occasion to go and see Gen-
" eral Wilson and ask for protection from the dis-
" ordered conditions that prevailed in and near Coto
" Laurél before the fire?

" Ans. The same day that the American
" troops landed I was here in Ponce. I
" heard reports from the Coto that they were
" going to burn the whole barrio that night, and
" then I sought General Wilson to make him under-
" stand that I had interests there, because on that
" same day General Miles had issued a proclamation
" in which he said he would defend the lives and
" property of the people. I asked him to lend me
" force enough to defend my interests. He imme-
" diately gave me 30 or 40 men. We left about 11
" o'clock that night. The interview that night was
" at about 9 o'clock, and we left Ponce about 11.
" We arrived at the second river and there we had
" to camp because the troops would not go further.
" In the morning we proceeded to the Coto, and we
" arrived and found nothing had occurred and the
" troops remained there in the advance.

" Q. Is it not a fact that your place was visited a
" few nights before the fire, and a large amount of
" provisions were taken out ij carts by some un-
" known men.

" Ans. It was not so it happened.

" Q. How was it?

" Ans. Bad people from Ponce arrived there
" drinking, and they continued to drink and then in
" the store they began to talk about all the
" Spaniards, and as I was the son of a Spaniard the
" moment they left the store I ordered the whole
" establishment to be locked up and came to Ponce.

" Q. Did not they take forcibly a large amount of
" provisions out of the store?

" Ans. No; they only broke the glass.

" Q. And nobody, prior to the fire, and within a " short time prior thereto took away any provisions " forcibly from your place—merchandise of any " kind?

" Ans. No, sir; except those people who came " through violence into my house.

" Q. Did you not appear before the Court to " accuse and testify as to certain persons having " stolen and taken away a large amount of pro- " visions and merchandise?

" Mr. Boerman: I object to that; the witness is a " willing witness and should not be impeached.

" The Court: No, he is your witness. Ask the " question.

" Q. was read.

" Ans. I went before the Court because these in- " dividuals, after the store had been closed, broke " down and tore, but without entering the store——

" Q. What date was it that these individuals " came there?

" Ans. Some days before the fire, I do not remem- " ber the date.

" Q. Did you not appear before the court martial " and accuse certain persons of having set fire to " this store on August 19, 1902.

" Mr. Boerman: I object to the question as it is " after the fire.

" The Court: The question is, did he not appear; " if it is not a fact that he did. Ask the question.

" Q. was read.

" Ans. No, sir.

* * * * *

" (p. 62, fol. 83).

" Q. Do you remember seeing Mr. Fritze present " during this conversation?

" Ans. Yes, there were several consuls there.

" Q. Do you remember what day it was?

" Ans. The same day the American troops landed " in Ponce.

" Q. Did you go to see General Wilson again " upon the same subject?

" Ans. No, sir.

" Q. Did you not call again and ask for protection " after that time?

" Ans. No, sir.

" By Mr. Boerman:

" Q. To make it clear, you say when you went to " see General Wilson that it was on the day the " troops entered Ponce—was it then the 25th of " July?

" Ans. It was the day the American troops came " in and the Spanish flag was hauled down.

" Q. It was in the month of July, was it not?

" Ans. I think that the landing in Guanica was " made on the 24th of July, and it must have been " the 25th, 26th or 27th when they came in here.

" (Mr. Martin retires.)

" HENRY C. FRITZE, recalled.

" By Mr. Dexter (p. 62, fol. 84):

" Q. Do you remember having occasion to call on " General Wilson in the summer of 1898 in company " with other consuls?

" Ans. Yes.

" Q. About how long after the invasion was that?

" Ans. I had occasion to see General Wilson al- " most daily for eight or ten days.

" Q. Do you recollect when it was that you saw " Mr. Martin, the plaintiff here?

" Ans. I do not recollect the exact date, but I " think it was during the first days that General " Wilson was here.

" Q. Do you know about when he arrived here?

" Ans. He arrived on the 27th of July, 1898.

" Q. And it was only a few days after that you " saw Mr. Martin?

" Ans. Yes, some time afterwards; I do not think " it was the same day.

" Q. State, if you know of your own knowledge, " there was an invasion existing in and about Coto " Laurel on the 19th day of August, 1898?

" Ans. I remember that during the first weeks the " American troops were here, there was a certain " amount of——

" Q. I speak now of invasion by foreign troops; if " there was an invasion in Porto Rico and in the " vicinity of Coto Laurel on the 19th day of August, " 1898?

" Ans. What do you mean by an invasion?

" Q. I mean a military invasion?

" Ans. A military occupation; of course there " was.

" Q. Of what nation was the invading army?

" Ans. The American troops.

" Q. With whom were these troops at war, if you " know?

" Ans. With Spain.

" Q. Do you know, of your own knowledge, if " there was an insurrection in or near the immediate " vicinity of Coto Laurel on the 19th of August, " 1898?

" Ans. I could not call it an insurrection but there " was a general state of insecurity.

" Q. What about mobs and riots in and near Coto " Laurel on the 19th of August, 1898?

" Ans. I cannot precise the date, if you ask me " whether there was a riot there on that day I " cannot say; there has taken place disorder in " Coto Laurel but I cannot remember the exact " date, so if you ask me if it was on the 19th, I " cannot say.

" Q. What was the general condition in and about " that vicinity of Coto Laurel about that time?

" Ans. Very insecure.

" Q. By what reason?

" Ans. On account of the Puerto Ricans.

" Mr. Boerman: That is merely a matter of opin-
" ion.

" Q. State whether things were normal?

" Ans. They were absolutely unnormal; not at all
" normal.

" Q. What are the facts upon which you base
" that statement?

" Ans. There was a general state of disorder
" which prevailed after the landing of the American
" troops.

" Q. In and about the vicinity of Coto?

" Ans. I know perfectly well that during the first
" days or even the first weeks after the landing of
" the American troops there was a great deal of
" disorder going on in and near the Coto, just the
" same as in the other parts.

" The Court: Was this on or about the 19th of
" August?

" Ans. About three weeks had passed since the
" Americans came in, and I recollect perfectly well
" that an orderly state of affairs had not been re-
" established by that time.

" CROSS-EXAMINATION:

" By Mr. Boerman (p. 64, fol. 85):

" Q. When were you in the Coto before the fire
" and before the 19th of August?

" Ans. It would be impossible for me to state at
" what time I went there.

" Q. Were you, during the month of August, in
" the Coto?

" Ans. I cannot say that; it is about four years
" now since then and I cannot recollect. I know I
" have not been there after the landing of the troops.

" Q. So all that you have testified is heresay?

" Ans. Oh, yes.

" Mr. Boerman: I now move the Court, under the
" witness' statement, to strike out all of his testi-
" mony as to this matter as it is hearsay only.

" The Court: You will have to confine it to the " actual conditions at the place where the insurance " existed. The object of the provision is, of course, " that the insured is not to suffer for any loss that " occurs by reason of a riot at that place or in- " vasion at that place. If you prove there is a riot *in* " Ponce, it might not reach there and he might not " be in any danger. I think the witness has to speak " of his own knowledge.

" The Witness: Will your Honor allow me to say " something? I want simply to state that in my " character as German Vice Consul I was, during " the first days of the invasion, a great deal in the " vicinity of the then authorities here, and while of " course, I was not personally present at Coto I knew " of the situation.

" The Court: Well, that is not competent."

" MARIA BALBINA RODRIGUEZ (for defendant:)

" By Mr. Dexter: (p. 65, fol. 86).

" Q. Please state your name?

" Ans. Maria Balbina Rodriguez.

" Q. Where do you live?

" Ans. Now in the Barrio Jacaguas.

" Q. Where did you live in the month of August, " 1898?

" Ans. In Coto.

" Q. Were you living there all of that month?

" Ans. Yes, and I was living there previously.

" Q. Do you remember the fire that took place " there on the night of the 19th of August, 1898, " when the house of Mr. Francisco Martin burned?

" Ans. Yes.

" Q. What was the condition in the Coto the " night the house burned; were the people quiet, " or was there any excitement going on?

" Ans. When we went to bed there was not a " great movement.

" Q. After that what was the first you knew " about the fire going on?

" Ans. Between ten and eleven we heard a move-
" ment there.
" Q. What was that movement?
" Ans. Persons and patrols of people.
" Q. What were they doing?
" Ans. That I do not know. I kept inside the
" house.
" Q. Were they quiet or noisy?
" Ans. They were very noisy; there was a great
" movement.
" Q. Do you know where these people came from?
" Ans. No, sir.
" Q. Were any estates fired, or people killed?

" The Court: Do not lead the witness.

" Q. What noises did you hear that night?

" Mr. Boerman: That is assuming that there were
" noises.
" The Court: Ask the question what occurred.

" Q. What occurred?
" Ans. At that moment we heard voices saying
" there was a fire at the house of Martin.
" Q. Did you see any strange people in town?

" Mr. Boerman: I object as it is immaterial and
" leading.
" The Court: Ask the question.

" Q. Did you see any strange people in the barrio
" that night.
" Ans. Yes.
" Q. Many or few?
" Ans. Many.
" Q. What did they seem to be doing?
" Ans. They were doing something bad, because
" there were many of them.

" The Court: Strike that last answer out?

" Q. Do you know of your own knowledge what
" was going on?
" Ans. Yes; they were burning down the houses.

" Q. Did you see any provisions or other property " taken out of any of the houses; did you see them " carry away anything, or take anything away from " the houses?

" Mr. Boerman: I think that is leading.

" The Court: Ask her what, if anything, they did,

" Q. What else did you see them doing?

" Ans. I did not see them doing anything more " but there was a fire.

" CROSS-EXAMINATION:

" Q. Did you see anybody setting fire to the " house?

" Ans. Not at night, but in the daytime.

" Q. Then when you said that they were putting " fire to the house it was only hearsay, was it not? " When you testified they were burning the houses " it was only from hearsay, was it not? You did not " see anybody putting fire to the house, did you?

" Ans. When I heard it I got up and saw it. I " heard voices saying that there was a fire at the " house of Martin and as I was living so near to it, I " got up.

" Q. How long did you sleep when you went to " bed that night; how many hours did you sleep?

" Ans. We did not sleep any because we went to " bed at 9 o'clock, and soon after that we heard the " movement.

" (Witness retires.)

" And thereupon the defendant Royal Insurance " Company to further maintain the issues on its " part, called and produced as a witness JOSÉ LARIO " ROCHE, who being duly sworn, took the stand and " testified as follows:

" JOSÉ LARIO ROCHE (for defendant):

" By Mr. Dexter (p. 66, fol. 88):

" Q. What is your name and occupation?

" Ans. My name is José Lario Roche; I am the al-
" calde of the barrio, and when the man came to
" summons me he had the wrong summons, he had
" a summons for Ramon Roche.

" The Court: That is all right. Go on if this is
" the witness you wanted.

" Q. Where did you live in the month of August,
" 1898?

" Ans. In the barrio of the Coto.

" Q. Were you there on the night of August 19
" 1898?

" Ans. I was in my store.

" Q. What was your business at that time?

" Ans. My business was having a little store a
" little lower down.

" Q. What office did you hold there at that time?

" Ans. I was the commissary of the barrio.

" Q. Please state what happened on the night of
" the 19th of August, 1898, when the house of Mr.
" Francisco Martin burned?

" Ans. That night there came a cart load of men
" from down below.

" Q. Who were these men—what kind of people
" were they?

" Ans. I did not know them.

" Q. What did they do?

" Ans. They fired an estate opposite my house and
" as I was the commissary of the barrio I told them
" not to break the peace in the place as we were in
" a state of war.

" Q. Were these people officers or soldiers?

" Ans. They were some individuals that were
" going there, and I went and told them not to fire.

" Q. At whom were they firing?

" Ans. At the air.

" Q. Were they soldiers or officers of the law?

" Ans. As it was night and dark I could not see
" their clothes, but I saw them raise a flag, or at
" least they called it that.

" Q. Did you see what flag that was?

" Ans. I saw the flag, and it was a flag—an " American flag, but it was at night and you could " not see well. They were people of the country " though because they spoke Spanish well.

" Q. What did you do then?

" Ans. They went on and as they were armed I " did not follow them.

" Q. How long after that did the fire occur at " Francisco Martin's house?

" Ans. They were firing there for about half an " hour, and then in order to find out who they " were I called out to them. I followed the road, " and when I got as far as the house of Martin I " saw it was on fire already, and then I asked " ' Who set that house on fire? ' and then the reply " was a blow.

" Q. Who struck the blow?

" Ans. I could not find out who it was, because " immediately afterwards it was from a poniard and " then I ran away home.

" Q. Were these people then present there?

" Ans. The people that came in the cart; I could " not know who they were.

" Q. Were these people residents of the town or " strangers?

" Ans. I had my eyes fixed on the fire and not on " the persons.

" Q. Were there many persons or few around " there that night?

" Ans. There were plenty.

" Q. Was it an usual or unusual number of people gathered there?

" Ans. There was about 16 or 20 or 30 in the barrio.

" By the Court:

" Q. You mean the people who lived in the barrio?

" Ans. The barrio has a thousand and odd people.

" No cross-examination."

Another witness, MANUEL PEÑAS ARRERO, called for the defendant, testified as follows (p. 68, fol. 90):

" I am a business man.

" Q. Where were you living in the month of " August, 1898?

" Ans. In the Coto Laurel.

" Q. Were you living there on August 19th?

" Ans. No, I was here in town then.

" Q. Were you in the Coto the night of that day?

" Ans. No, sir.

" Q. When did you leave there for Ponce?

" Ans. About eight or ten days previously.

" Q. What was the occasion of your leaving there " and coming to Ponce?

" Mr. Boerman: I object to that as it is immaterial " entirely.

" The Court: Let him state what he saw; he can- " not give any private reasons for what he did.

" Q. State, if you know, of any disorder by which " you were compelled to leave Coto?

" The Court: That is leading.

" Q. Why did you leave the Coto?

" Ans Because at that time there were bands of " seven or eight who went around the place.

" Q. Where were these bands operating?

" Ans. They were moving about from place to " place in the Coto.

" Q. What did they do?

" Ans. They came to my house—they were threat- " ening Spaniards—and said that by order of Gen " eral So and So we had to deliver to them all we " had.

" Q. Was anybody else compelled to leave the " Coto at that time, if you know?

" Ans. That I cannot tell.

" Q. Was any property of yours destroyed about " the 19th of August, 1898?

" Ans. All that I had.

" Q. How was it destroyed?

" Ans. As I discovered the day after, it was by " fire.

" The Court: That is excluded from the testimony " —what he heard.

" Q. Do you know of your own knowledge how " that property was lost?

" Ans. I have said that I knew the next day that " everything was burned up.

" Q. Did you see the remains of it when you went " back there the next day?

" The Court: I cannot go into that; it may have " been burned in some other way.

" CROSS-EXAMINATION:

" Q. Is it not a fact that at that time the State of " Porto Rico in all the barrios was the same as in " Coto, just as well as in the other parts?

" The Court: That is not competent. I cannot go " into the discussion of the condition of Porto Rico.

" Q. Is it not a fact that the state of all the bar- " rios in the vicinity was the same?

" Ans. Yes, the same as this.

" Q. And the state in Coto was not different " from the state in any other barrio?

" Ans. I did not leave the barrio except to come " here to Ponce."

JOSÉ JULIAN LEON, another witness called by the defendant, testified (p. 69, fol. 92):

" I am a merchant and live in the Coto Laurel.

" Q. Where did you live on the 19th of August, " 1898?

" Ans. In the same Coto Laurel.

" Q. Were you there on the day and night of " the 19th of August?

" Ans. Yes, at home.

" Q. Will you state what happened that night?

" Ans. About midnight I heard a cry of " Fire!"

" Q. Were there any strange people in the barrio
" that you saw?
" Ans. No, sir, the same as ever.
" Q. Do you know how the house of Mr. Fran-
" cisco Martin took fire?
" Ans. No, I do not know; I was living at a short
" distance from him.
" Q. What was the condition of the barrio that
" evening with reference to noise or excitement?
" Ans. I did not hear any.
" Q. Have you ever testified before about the cir-
" cumstances of that night?

" Mr. Boerman: I object to that; it is immaterial.
" The Court: He can prove he made other state-
" ments, and can impeach him by them.

" Q. Have you ever testified upon any other occa-
" sion about the circumstances of that night?
" Ans. I did declare, but it was to make known
" that when I heard the word 'fire' I saw the
" house of Francisco Martin afire, and about the
" individuals who helped me to carry provisions out
" into the yard.
" Q. Whose provisions do you refer to?
" Ans. To my provisions in my own establish-
" ment.
" Q. Why did you take those provisions out?

" The Court: That is objectionable.

" Q. Was there anything happening around your
" house that gave you an alarm?

" The Court: If that was after the fire began I do
" not think I can go into that.

" Q. Did you go into the house of Francisco Mar-
" tin a short time before the fire?
" Ans. No.
" Q. Were you never in the house of Francisco
" Martin?
" Ans. On that day no, but at several times be-
" fore. I had been living there about fourteen years."

After this evidence on behalf of the defendant the plaintiff called two witnesses, one *Luis Lopez* who testified (p. 71, fol. 93) that he resided in Coto Laurel. That he was a carpenter and had lived there from the year 1895.

" Q. Have you been living there since the month " of August, 1898?

" Ans. Yes.

" Q. Did you absent yourself at any time?

" Ans. No, sir.

" Q. Were you there during the whole month?

"Ans. Yes, all the month.

" Q. State what was the condition of the Coto dur- " ing that month so far as tranquility was con- " cerned?

" Ans. At the beginning, and when the troops " passed through there was some uneasiness, but " when they had passed everything was quiet " again.

" Q. When did the troops pass?

" Ans. They passed through there at the begin- " ning of the month and were in camp in the neigh- " borhood.

" CROSS-EXAMINATION:

" Q. Do you not know it to be a fact that there " was a number of unknown people who visited the " barrio of Coto very frequently during the month " of August, stealing and threatening people?

" Ans. No, sir.

" Q. You never saw anything of that kind?

" Ans. Nobody threatened me, nor did I see any- " body being threatened.

" Q. What was your business during the month " of August?

" Ans. I was employed there in a store.

" Q. By whom?

" Ans. By the Sucesion de Cerellez.

" Q. Where?

" Ans. In the Hacienda 'Ponceña.' I was living " in Coto.

" Q. Did you see the fire that night of the 19th of " August when the house of Francisco Martin was " burned?

" Ans. When I arrived there it was already " burned down, but still burning.

" Q Where did you come from at that time?

" Ans. I was sleeping there at Coto.

The other witness was Miguel Montenegro, a laborer now employed in Ponce. He testified (p. 72, fol. 95) that he lived in Coto Laurel before he came to Ponce four years. He lived there in the month of August, 1898, during the invasion. He lived there a whole month.

" Q. Tell what was the condition of the Coto so far " as tranquility was concerned during that month?

" Ans. The whole month was tranquil.

" Q. Did you see any disturbance, or anything " committed there?

" The Court: He says it was tranquil.

" CROSS-EXAMINATION:

" Q. And during all the month of August you " never heard the cry of 'Fire' in the Coto?

" Ans. No, sir; until the 29th of August, at night, " the next day I heard some shouts: it was from " 10 o'clock on.

" Q. What day was it that the house of Francisco " Martin burned?

" Ans. The 29th, or the morning of the 20th.

" Q. Was that the morning that you heard the " shouts of 'Fire,' the morning or the night that " the house of Francisco Martin burned?

" Ans. No, sir; the next day at 10 o'clock, between " 10 and 11.

" Q. How do you know it was the night of the " 29th?

" Mr. Boerman: I think he said the 20th.

" Q. How do you know that it was the night of " the 20th that that fire took place?

"Ans. Let me tell you now, I am out of my way; "it was on the 19th and the 20th.

"Q. Where were you that night?

"Ans. Sleeping at home.

"Q. Where is your home?

"Ans. About two cuerdas from the house of Pan- "cho Martin.

"Q. Were you working for Don Pancho then?

"Ans. No, sir; I was working for the hacienda.

"Q. Do you know whether any people took away "any provisions from the store of Don Pancho any "night before that?

"Ans. I do not know; I cannot say.

"Q. Do you know of your own knowledge "whether provisions were taken away from his "place?

"Ans. No, sir; I do not remember; I saw nothing "of that.

"Q. You say there was no riot or commotion at "all there at that time?

"Ans. No, sir."

This closed the testimony.

The charge of the Judge so far as it relates to this point was as follows (Record, p. 80, fols. 104, 105):

"Another defense presented by the answer is "that the loss was caused by invasion, or occurred "during invasion, war, riot, &c. I will read to "you a part of the condition of the policy relative "to this matter, although the entire policy and "all its conditions is before you as testimony. It "provides, 'this policy does not cover loss or dam- "age by fire happening during any invasion by "foreign enemy, during rebellion, insurrection, "riot, civil commotion, military or usurped power "or martial law within the country or locality "within which the property insured is situated, "unless proof be made to the satisfaction of the "directors that such loss or damage was not oc-

" casioned by or connected with, or occurred from a
" cause or causes independent of the existence of
" such invasion, foreign enemy, rebellion, insurrec-
" tion, riot, civil commotion, military or usurped
" power or martial law.'

"The defense mainly relied upon here is that this
" loss occured during an invasion, riot, civil com-
" motion, military or usurped power, or martial
" law. A fair construction of that condition in the
" opinion of the Court is that that must, in order
" to excuse this company from liability in case of
" loss of property by fire, that that invasion by
" foreign enemy, rebellion, insurrection, riot, civil
" commotion, military or usurped power or martial
" law, must have been occurring within the section
" of the country where this loss occurred, or within
" the locality, and within such a radius of country
" where the loss occurred that danger arose to
" property by reason of the existence of that rebel-
" lion, invasion, insurrection, civil commotion,
" military or usurped power, or martial law. And
" I further tell you, gentlemen, that if you believe
" from the evidence that this destruction of this
" property did not occur from any of these causes,
" and occurred from a cause independent of the ex-
" istence of any foreign enemy, rebellion, insurrec-
" tion, riot, civil commotion, military or usurped
" power or martial law, then you should find so far
" as this defense is concerned for the plaintiff in
" damages whatever you think may have been his
" loss. This is a reasonable construction, as the
" Court thinks, of this and these conditions of the
" policy. * * * if you believe from the testi-
" mony that this loss occurred during invasion, re-
" bellion, riot, civil commotion, and other states of
" case as set out in the policy existing in this local-
" ity where this store and real estate was located,
" or in that section of the country, and that it oc-
" curred by reason of the existence of that state of
" case, why then, if you believe it did occur from
" that state of case in that section where the loss

" occurred, and by reason of it, you would find for " the defendant."

To this part of the charge the defendant excepted as follows (Record, pp. 82, 83):

" Mr. Dexter: Defendant also excepts to that part " of the charge which states substantially as fol- " lows: 'A fair consideration of the condition (re- " ferring to the condition of the policy which is " contained, I think, in part 3, referring to the " invasion, riot, &c.) is, in order to excuse from " liability, that the invasion (and repeating the " other words in that connection) that the invasion, " foreign enemy, rebellion, insurrection, riot, civil " commotion, military or usurped power or " martial law must have been occurring in the " section of the country or the locality where the " fire occurred, and within such a radius of country " that danger arose by the existence of such in- " invasion,' and naming the other circumstances " referred to in the policy.

" The Court: I overrule that.

" Mr. Dexter takes an exception.

" Mr. Dexter: Defendant also wishes to except to " that part of the charge of the Court to the effect " that 'if you believe that the loss did not occur " from these causes.' The objection being that " defendant asks that the charge instruct the jury " that they shall find for the defendant if they find " that the loss occurred during the existence of any " of these conditions.

" The Court: This cause or any of them.

" Mr. Dexter: Defendant asks that the charge " be modified to this effect: 'If you believe that " the loss occurred during the existence of inva- " sion, foreign enemy, rebellion, insurrection, riot, " civil commotion, military or usurped power or " martial law then you will find for the defend- " ant.' In other words, not making that the " cause, but if it is shown that those circumstances " existed that then——

"The Court: The objection you make is, if that "is modified as you wish – but it does not fix any "locality or section of the country.

"Mr. Dexter: Your Honor has already passed "on that in this prior objection, but I refer now to "the other feature as to whether the fire should "prove to be the result of any of these conditions "mentioned which would be the cause. We object "to making——

"The Court: I have told the jury that if the fire "arose by reason of any of these causes existing in "that section or locality of the country.

"Mr. Dexter: That is the part defendant excepts "to.

"The Court: You may take an exception to "that. I understand you are claiming, for instance, "if the Germans had invaded San Juan and got into "San Juan, and if this property in this place had "been destroyed by a boy dropping a match, that "the Company would be released. The Court has "not that view."

The defendant was entitled to the charge requested by the plaintiff in error in modification of the foregoing as follows:

"If you believe that the loss occurred during the "existence of invasion, foreign enemy, rebellion, "insurrection, riot, civil commotion, military or "usurped power or martial law, then you will find "for the defendant." To the refusal the defendant excepted (Record, p. 83, fol. 110).

And the fifteenth assignment of error is good (Record, p. 25, fol. 39).

There was no evidence whatever of the fire being attributable to any other cause than the invasion, riot or civil commotion then existing in that part of Porto Rico. The town of Coto Laurel is within 5 kilometers or about $3\frac{1}{10}$ miles from Ponce (Record, p. 30, fol. 51). The American troops had been at Ponce since the 25th of July (Record, p. 62, fol.

83). At the request of the defendant in error made to the Commanding General a force of troops 30 or 40 strong had been sent down to protect his place (Record, p. 60, fol. 81). This fact was at first suppressed by the defendant in error in his testimony, and until other witnesses had testified to his conversation with General Wilson, he said nothing about it, and claimed that the condition of affairs in and about Coto was perfectly normal. Seeing that the fact of his request for military protection was known, he then admitted when recalled, and upon resumption of his cross-examination, these facts. His own testimony is sufficient to show that a state of war existed—an invasion; and the testimony of other witnesses in Coto was overwhelming, that on the 19th of August there was a commotion and disturbance in Coto, and that houses and property were burned. The fact that some witnesses were asleep and heard nothing is not contradictory of this; nor was there on the trial the slightest attempt to show that the fire was attributable to any other cause.

A fair construction of this condition in the policy is that where a state of invasion or martial law exists in the neighborhood where the fire was, the company is not liable for the loss by fire, unless there be some evidence that the fire was attributable to some other cause. The presumption created by the policy is that it was attributable to the invasion. It is not enough that there was no evidence as to any other cause, as was the fact here. The policy required that there should be affirmative evidence attributing the fire to some other cause. It may not be necessary to hold, in accordance with the literal interpretation of the condition, that the Directors must be satisfied that there was not some other cause. It may well be that, if there was proof of some other cause, the mere fact that the Directors were not satisfied by it would not be enough.

The case then was one where the evidence was undisputed of the existence of invasion in the very district of country where the property was situated and the main body of the invading troops was within three and a half miles of the property, and at the request of the owner of the property a detachment of soldiers was sent to the very place insured. The defendant's counsel might well have asked the Court to rule that a state of invasion did exist at the place where the property was, but the instruction asked was simply that if the jury found the fact of invasion, &c., then the plaintiff could not recover. This the plaintiff in error was entitled to upon the state of the proof.

So also the proof was very explicit that a mob existed at the very time and place of the fire, the only evidence to the contrary being that certain witnesses did not hear or see the evidences of a mob, some or all of whom were asleep at the time (Testimony of Maria Rodriguez, *supra*, p. 46; José Lario Roche, *supra*, p. 48).

The fourteenth assignment of error was also well taken on the ground stated therein, that it did not fairly give effect to the terms of the contract contained in the policy of insurance, and that the effect of the ruling was to narrow the application of the language of the policy and limit the defense of the plaintiff in error to proof that the loss was the direct result of one of those enumerated conditions or causes (Record, p. 24, fol. 39).

This ruling was calculated to injure the defendant with the jury. It threw the burden on the plaintiff in error to satisfy the jury that the fire occurred from some cause independent of the invasion, rebellion, riot, &c.

So, also, in the same connection, the remark volunteered by the Judge that he understood defendant's counsel to claim "that if the Germans had "invaded San Juan, and if this property in this "place had been destroyed by a boy dropping a "match, the company would be released," was

calculated to injure the defendant with the jury, and the sixteenth assignment of error is good (Record, p. 88, fol. 111; Record, p. 25, fol. 40).

## FOURTH POINT.

**The judgment below should be reversed and a new trial ordered, with costs to the plaintiff in error.**

WILLIAM G. CHOATE,
Of Counsel for Plaintiff in Error.